

NEOH KEE SENG

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v.

ONG SENG DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG

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ZALEHA ZAHARI J

[CIVIL SUIT NO: 23-269-1986]

28 DECEMBER 1999

CIVIL PROCEDURE: *Want of prosecution - Striking out - Delay - More than one defendant - When time starts running - Whether there is inordinate and inexcusable delay*

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In August 1986, the plaintiff commenced a writ action against the 2nd defendant and 13 other defendants. The plaintiff served the writ on the 2nd defendant about one and a half years later. The 2nd defendant filed his appearance and defence. But, since the filing of the 2nd defendant's defence, there seemed to be no further steps taken by the plaintiff with regard to the suit against the 2nd defendant. The 2nd defendant then filed the instant application to strike out the plaintiff's suit against him on the ground of inaction on the part of the plaintiff to set the matter down for trial. In his reply to the 2nd defendant's application, the plaintiff contended that he could not take further action earlier because the court file on this matter could not be traced. He also attributed the blame for the delay on the failure of the court to fix a hearing date consequent upon the plaintiff's successful appeal to the Supreme Court.

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Held:

[1a] The case against the 2nd defendant should not be considered in isolation. Due regard must be given to the development of other interlocutory applications, notwithstanding the fact that they were filed by other defendants and did not implicate the 2nd defendant.

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[1b] As the case involved many defendants, it was prudent and quite in order for the plaintiff to defend all the striking out applications first. Delay attributable to the disposal of the striking out applications, including appeals, was excusable and should not be held against the plaintiff.

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[2] Therefore, the computation of time to determine delay in this case commenced from the date of the Supreme Court's decision on the plaintiff's appeal.

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- a* [3] The plaintiff was guilty of inordinate and inexcusable delay in taking more than three and a half years to prepare and extract the order made in respect of the summons for directions.
- b* [4] In any event, the order made in respect of the summons for directions was invalid and of no legal effect because counsel for the plaintiff had no authority to mention on behalf of counsel for the 2nd defendant on the day fixed for hearing the application.
- c* [5] All breaches of the Rules of the High Court 1980 committed by the plaintiff's counsel, eg, not serving the summons for directions on the defendants, were not mere irregularities but were substantive and incurable.

[Second defendant's application allowed.]

Case(s) referred to:

- d* *Birkett & James* [1977] 2 All ER 810 (*refd*)
Hong Kong Bank Bhd v. Raja Letchumi Ramarajoo [1996] 4 CLJ 155 (*refd*)
Public Finance Bhd v. Natcom Development Sdn Bhd [1996] 4 CLJ 291 (*refd*)
R Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 (*refd*)
Toh Hock Thye & Ors v. Toh Chwee Biow [1981] 1 CLJ 87b (*refd*)

e **Legislation referred to:**

Rules of the High Court 1980, O. 2, O. 3 r. 6, O. 24 r. 5(1), (2), (3), O. 25 rr. 1, 2

For the plaintiff - Abdul Fareed Abdul Gafoor; M/s VM Mohan, Fareed & Co

For the 2nd defendant - Regina Daniel; M/s Cheong Wai Meng & Van Buerle

- f* *For the 8th & 13th defendants - Lim Cheng Poh; M/s Lim & Rahim*

For the 4th & 12th defendants - Anastasia Tan; M/s Chew, Tan & Lim

Reported by Izzaty Izzuddin

JUDGMENT

g **Zaleha Zahari J:**

By summons-in-chambers filed on 9 September 1997, Khaw Khoon Hoe ("the 2nd defendant") applied for an order to strike the claim filed by the plaintiff against him for want of prosecution alleging several breaches of the provisions in the Rules of the High Court 1980 ("RHC").

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On 30 October 1998 I allowed the 2nd defendant's application and struck out the action of the plaintiff against the 2nd defendant for want of prosecution. My reasons follow:

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Background

The background facts relevant to this application are as disclosed in the affidavits of the 2nd defendant affirmed on 6 September 1997 (encl. (105)), and that affirmed on 13 November 1997 (encl. (109)). The plaintiff's affidavit in reply is that as affirmed by the plaintiff's present counsel, Encik Abdul Fareed b. Abdul Ghafoor affirmed on 13 October 1997 (encl. (108)), and that of his previous counsel, Encik Mohan a/l V. Muthu, affirmed on 30 June 1998 (encl. (113)).

The plaintiff had issued a generally endorsed writ against Oon Seng Development Sdn. Bhd. and 13 others about 13 years ago, on 18 August 1986. The plaintiff cited Khaw Khoon Hoe as the 2nd defendant.

As far as the proceedings against the 2nd defendant, is concerned, the plaintiff served the writ on the 2nd defendant about one and a half years after its filing. Upon being served with the writ, the 2nd defendant duly filed his appearance on 15 February 1988 (encl. (19)), and thereafter, upon service of the plaintiff's statement of claim (encl. (22)) upon him, he filed his statement of defence on 9 May 1988 (encl. (40)), which was served on the plaintiff's counsel on 11 May 1988.

The general ground advanced for this striking out application is the inaction on the part of the plaintiff to take further action in respect of this suit as against the 2nd defendant since the filing of the 2nd defendant's statement of defence about nine years ago.

I will now deal in greater detail with the issues and arguments advanced by counsel for the 2nd defendant in support of this application, and the response of the plaintiff's counsel to these points in turn. But before I do so, it may be useful to set out the principles established by case law that must be applied in the consideration of an application to strike out for want of prosecution.

1. Principles Applicable

As to the approach the courts should adopt to dismiss an action for want of prosecution, in *Birkett and James* [1977] 2 All ER 810 at 805 Lord Diplock said:

The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or (2) (a) that there has been such an inordinate delay

- a** and inexcusable delay on the part of the Plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.
- b** In the Federal Court decision of *Public Finance Bhd. v. Natcom Development Sdn Bhd.* [1996] 4 CLJ 291; [1996] 2 MLJ 657, 664 it was held that:
- The law in regard, to the timeous prosecution of suits stated in many cases decided by the precursors of this court and nothing may be usefully added to the learning contained in them. The effect of these decisions may be summarized thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such general disinterestedness in the conduct of litigation as to invite the inference that he has no desire in prosecuting his claim.
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- The case of *Toh Hock Thye & Ors v. Toh Chwee Biow* [1981] 1 CLJ 87b; [1982] 1 MLJ 152 is also instructive. The Federal Court in this case held that the appellants having kept the suit in abeyance for five years and three months during which they remained completely inactive and having given
- e** no answer nor satisfactory explanation at all to this inactivity when called upon to do so by this court, were guilty of inordinate and extensible delay if not also intentional and contemptuous conduct which entitled the court to dismiss their action for want of prosecution.
- f** Also relevant is case of *R. Rajasingam v. Balwant Singh Purba* [1996] 3 CLJ 222; [1996] 2 MLJ 549. The Court of Appeal held that a delay of more than six years before the affidavit verifying documents was filed followed by the further delay by the respondent when the respondent failed to file the necessary documents in time, those delays have the cumulative effect of inordinate and inexcusable delay which has the effect that the
- g** defendant/appellant had been prejudiced.
- The case of *Hong Kong Bank Bhd v. Raja Letchumi a/p Ramarajoo* [1996] 4 CLJ 155 is authority for the proposition that there is much prejudice to a defendant in having an action hanging over his head.
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2. When Computation Of Time To Determine Whether The Plaintiff Was Guilty Of Delay Should Commence?

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Counsel for the 2nd defendant computed time to determine delay from the date of filing of the 2nd defendant's statement of defence.

The 2nd defendant rests her case on delay on the plaintiff's failure to set this case down for trial to date of filing of this application. As to the action of the plaintiff in setting down of this case down for trial a year after the filing of this application to strike out, ie, on 24 August 1998, her contention is that it is nit valid due to several irregularities which will be dealt with in greater detail later on in this judgment.

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The initial issue for determination at this stage is whether counsel for the 2nd defendant was right in submitting that the plaintiff had failed to prosecute his claim diligently and in alleging that there was a delay of about nine years?

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The plaintiff's counsel, Encik Abdul Fareed, submitted that the plaintiff had been diligent and taken continuous action in this case. According to him this was a complicated case. The fact of this file running into over 100 enclosures was to be taken as testimony that this was so.

The court's attention was drawn to the striking out applications filed at the instance of some of the defendants in this case, the decision of the Honourable Justice Datuk Mohamed Dzaiddin b. Hj. Abdullah dated 16 October 1989 in respect of these applications; the plaintiff's appeal to the Supreme Court *vide* Appeal No. 02-132-90 against the said decision; and lastly, the Supreme Court decision delivered in April 1994 allowing the plaintiff's appeal.

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Encik Fareed in his affidavit averred that, since commencing work at his present firm in 1994, he had caused to make ten unsuccessful attempts to make a file search of this file. That he was unable to conduct a search as the court file could not be traced. According to him this file resurfaced only in April 1997 and that he made a search of this file in July 1997.

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Pausing here for a moment, on an examination of the court file, there is on record only one application by Encik Fareed to make a search of this file, and that was in 1997 ie, encl. (107). As to the earlier attempts allegedly made by Encik Fareed from April 1994 onwards, he did not give details as to the dates of these attempts. It was a bare statement unsupported by any supporting evidence.

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- a* Reverting back to Encik Fareed's affidavit, upon conducting the search on 8 July 1997, he found the file to be not in order. That many documents filed were, according to him, were not in the court file and could not be traced. Here again, the court notes, Encik Fareed has failed to particularise and give details as to what these alleged "missing" documents were, who
- b* filed them and the date of its filing. These were the circumstances and the reasons why the plaintiff was unable to take further action much earlier in this file. The allegation that the plaintiff was guilty of inordinate and inexcusable delay is, according to him, untrue.

- c* An examination of the court file reveals that this file was very active from date of its filing in 1986 until the end of 1989. Several interlocutory applications had been filed by the plaintiff, as well by as by some of the defendants. On the part of the plaintiff there was an application for injunction. On the part of the defendants, several defendants had filed an application to strike out the suit against them, ie, encls. (35), (38) and (39)
- d* (that filed by the 4th, 12th, and 1st, 8th and 13th defendants respectively) sometime in October 1988.

- e* The court took note of the decision dated 16 October 1989 of the Honorable Justice Datuk Dzaidin in respect of these striking out applications where he held that there were triable issues as against the 1st defendant, but however struck out the suit as against the 4th, 8th, 12th, and 13th defendant. This court also took note of the appeal lodged by the plaintiff, in respect of the decision to strike out the claim against the 4th, 8th, 12th and 13th defendants made *vide* Supreme Court No. 02-132-90.

- f* The 2nd defendant was not a party to any of these applications to strike out. The position taken by counsel for the 2nd defendant is that, after filing the 2nd defendant's statement of defence (encl. (40)) way back on 8 March 1988, the pleadings in this case is deemed to have been closed thirty days thereafter pursuant to O. 25 r. 1 RHC and the plaintiff should have
- g* proceeded to set this case down for trial.

- h* I would agree with this proposition if this suit was only between the 2nd defendant and the plaintiff. But this is not such a case. It involves 13 other defendants, five of whom have deemed it fit and necessary to file striking out applications.

- i* In the computation and the consideration of whether the plaintiff was guilty of delay in prosecuting his claim, I am of the view that the case against the 2nd defendant cannot be considered in isolation. Due regard must be taken of the development, of these striking out applications, notwithstanding the fact that these interlocutory applications do not implicate the 2nd

defendant. I am of the considered opinion, in the interest of justice, and as a matter of expediency and practical application, the plaintiff clearly cannot, in such a circumstance, be expected take further steps to prosecute the case as against the 2nd defendant at that point of time. *a*

In my view it was prudent and quite in order for the plaintiff to defend all of these striking out applications in the first instance. Delay attributable to the disposal of all of these striking out applications (including the appeal to the Supreme Court) is excusable and cannot and should not be held against the plaintiff. *b*

In the consideration of this application this court will commence the computation of time to determine delay from the date of the Supreme Court's decision, which, I understand from the submission and affidavit of counsel for the plaintiff, was delivered in April 1994. *c*

3. Allegation Of The Plaintiff's Counsel Of This Court Contributing To The Delay? *d*

I would like to deal with this allegation made by the plaintiff's counsel next.

The affidavit of the plaintiff's previous counsel, Encik Mogan, attributes blame for this case present status to the failure of this court in not giving a hearing date consequent upon the plaintiff succeeding in his appeal in the Supreme Court. Likewise, the plaintiff's present counsel, Encik Fareed, by alleging in his affidavit that he was unable to make a file search between the period April 1994 to April 1997 due to the court file being untraced, also appears to attribute some blameworthiness on this court for delay. *e*
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These are serious allegations and, if substantiated, I agree that litigants should not be made to suffer on account of the action or inefficiency of the court. *g*

I have perused the court file very carefully on this issue. With regard to the alleged abortive search attempts made by the Encik Fareed I had earlier noted his failure to give details as to when they were made, and the fact that there were no supporting evidence and was therefore a bare statement. In the absence of some supporting evidence as to these search attempts, I find this allegation of the file being missing to be rather unconvincing. *h*

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- a* Notwithstanding the absence of the supporting evidence, even if this court were to accept that the plaintiff's counsel did in fact attempt to make the search that he alleged he did, I then ask myself this question. If indeed the court file could not be traced way back in 1994, was he right in just standing by and wring his hands and allow more than three years to pass by!
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On this issue I am in agreement with the submission of the 2nd defendant's counsel that there was absolutely no reason, if he had a desire to have the matter litigated, why he did not take any step to reconstruct the file and got on with it. It is axiomatic that the law assists the vigilant and not the indolent.

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- In any event following the plaintiff's successful appeal in the Supreme Court, even if the plaintiff had informed this court of the result of his appeal, the plaintiff must first comply with the provisions relating to discovery and exchange of documents and then set this case down for trial.
- d* It is trite law that in a writ action various interlocutory stages precede the setting down of a case for hearing so that the parties would have ample opportunity to scrutinise the pleadings and to consider other available evidence before this court give a hearing date.

- e* Thus, if this court were to take the statement of defence of the 13th defendant on 13 May 1994 as the last pleading filed, pleadings are deemed to have been closed one month thereafter, ie, on 13 June 1994, and the plaintiff should then have taken steps to proceed to file summons for directions pursuant to O. 25 r. 2 of the RHC.

- f* The record however reveals that the first time this court is put to notice of the plaintiff's successful appeal is from the affidavit of the plaintiff's counsel responding to this application of the 2nd defendant to strike out for want of prosecution!

- g* Be that as it may it could however be argued that this court is deemed to have notice that that was the result, when there was activity in this file in May 1994, upon the 4th, 12th and 13th defendants filing their statement of defence; ie, the 4th and 12th defendant, on 3 May 1994, whilst the 13th defendant, on 13 May 1994. About three months later, on 10 August 1994,

- h* the plaintiff filed a summons for directions as in encl. (101). Be that as it may, the validity of the summons for directions, encl. (101), was challenged on ground of several irregularities which I will be dealing with next.

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3. Whether Enclosure (101) Valid?

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Counsel for the 2nd defendant informed the court that the plaintiff served the summons for directions (encl. (101), only two days ago, ie, 25 August 1998, bearing the return date of 26 October 1994 (which is more than four years after its filing and three years ten months after it was heard and disposed of). As she had no knowledge whatsoever of encl. (101), nor as to what transpired at the hearing on 26 October 1994, when the plaintiff's counsel subsequently submitted a draft order for her approval in respect of the proceedings of 26 October 1994 which she had no knowledge of, she accordingly therefore declined to approve the same.

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Encik Fareed chose not to meet this issue of non-service of encl. (101) in his submission. In these circumstance he is deemed to have admitted that encl. (101) was not served on counsel the 2nd defendant prior to its hearing on 26 October 1994. I therefore accept as a fact that counsel for the 2nd defendant had no knowledge of encl. (101), nor of the order made by the court on 26 October 1994, until three years nine months after the event; and that the time taken by the plaintiff's counsel to extract the order of 26 September 1994 (ie, on 26 August 1998) was of three years ten months.

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From the order extracted, encl. (116), the court noted that one Encik V.M. Ravi mentioned on behalf of the plaintiff's counsel as well as on behalf of the defendants. On the facts now presented before me, Encik Ravi clearly had no authority on that date to mention on behalf of counsel for the 2nd defendant's counsel as she was totally ignorant of the said application at that point in time.

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Pausing here for a moment it appears to me that the plaintiff's counsel appears to be either totally ignorant of the procedural rules, or that he took them extremely lightly. To summarise the position taken by the plaintiff's counsel in this application:

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- (a) that it was in order for him to serve an application on a party years after the application had been disposed of;
- (b) that counsel who was not privy to and who had no knowledge of an application due to non service, was expected to approve orders made in their absence;
- (c) that time frames fixed by the court in such an order to do a certain things need not be observed; and
- (d) if and when challenged for non-compliance, that he can seek shelter under O. 2 RHC by contending that they were but mere irregularities!

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- a* In my opinion the non-compliance that had occurred in this case are not mere irregularities. I hold that on a proper reading of the O. 25 RHC, the mere filing of a summons for directions does not suffice. All parties to the suit must be served with the said summons for directions so that they would also have the opportunity to appear and address and inform the court as to their own requirements for trial. The failure to serve means that the 2nd defendant is denied (and in all probability the other defendants as well) of the opportunity to inform the court of their requirements and the directions issued by the court on 26 October 1994 does not reflect the requirements of the 2nd defendant.
- c* In all of the circumstances of this case I also further hold that the plaintiff's counsel was guilty of inordinate and inexcusable delay in taking more than three and a half years to prepare and extract a simple order made in respect of encl. (101). In any event I am of the view that the order dated 26 October 1994, emanating from an unserved application, and by reason of Encik Ravi having no authority to mention on behalf of counsel for the 2nd defendant on the date of hearing, to be invalid and of no legal effect.

- e* The end result of all of these rulings is that, as there is no valid summons for directions filed to date, the plaintiff has therefore not complied with O. 25(1) RHC.

4. Non-compliance By Plaintiff With The Directions Given By Court Order Dated 26 October 1994?

- f* Should I be considered wrong in so holding, and the summons for directions and the order dated 26 October 1994 is curable and can be considered as valid, I now come to consider the next issue raised by the 2nd defendant, that relating to the failure of the plaintiff to file an affidavit verifying documents.
- g* Order 24 r. 5(1) RHC requires the list of documents made in compliance with r. 2 or an order under r. 3 to be in Form 40, and must enumerate the documents as shortly as possible but describing each of them sufficiently to enable it to be identified. If it is desired to claim any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege (O. 24 r. 5(2)); and an affidavit verifying a list of documents must be in Form 41 (O. 24 r. 5(3)).
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According to court order dated 26 October 1994 (encl. (116)), the plaintiff was required to serve on the defendants a list of documents and an affidavit verifying the said documents within 14 days. Likewise, the defendants were also given 14 days to serve on the plaintiff their list and affidavit verifying the same. Inspection and discovery was to take place 30 days thereafter. One day was allotted for trial with three witnesses.

The facts enumerated earlier on in this judgment speak for themselves. The plaintiff clearly had acted at sluggish pace. That by the time the plaintiff's counsel took steps to serve the already disposed of summons for directions on counsel for the 2nd defendant, and by the time he extracted and served the order, the time to do the various acts prescribed in the order had long expired. It was already more than three years too late!

Further, with regard to the notice to inspect documents filed by the plaintiff on 25 August 1998, encl. (115), and the bundle entitled "Senarai Dokumen" filed by the plaintiff on the same date, is clearly not a "Bundle of Documents" as envisaged by the RHC. The said Bundle only lists out and contains pleadings and earlier affidavits filed in respect of interlocutory applications instead of listing out the documents in the possession of the plaintiff. By reason of plaintiff's failure to file an affidavit verifying documents in the prescribed Form as provided by O. 25 r. 5, to date, discovery and exchange of documents therefore still cannot take place.

On this issue Encik Fareed in his submission candidly admits that he had not filed a proper affidavit verifying documents to date and conceded that the Bundle filed by him entitled "Senarai Dokumen" on 25 August 1998 was not in compliance with the Rules. Be that as it may, Encik Fareed again argued that the failure to do so was yet another curable irregularity. He then submitted that there was waiver of this irregularity by reason of the fact that counsel for the 2nd defendant had accepted service of the same; that she should be estopped from raising this irregularity by reason of the fact that she took three months taken to file this application.

It cannot be denied that in the conduct of a cause in court, adhering to the forms and rules, will, in the long run, ensure a speedy and efficient administration of justice. Rules of the High Court are intended to facilitate and not impede the administration of justice. Those who undertook to give skilled advice are under a duty to take care and skill in the conduct of litigation and that this does include pretrial work.

The plaintiff's counsel in this case has clearly not exercised his duty as counsel with care and the required skill in the conduct of litigation. He appears to be unfamiliar with the provisions relating to pre trial procedure.

- a* Not only was he guilty of inordinate delay in the extraction of a court order, he had also failed to comply with a peremptory order of the court. Further, after a long lapse of inaction, O. 3 r. 6 RHC requires the plaintiff to file a notice of intention to proceed before he can proceed with this case. On the facts of this case, the plaintiff's counsel had also failed to observe this rule before taking the action that he did in mid 1997.
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- All of the breaches committed by the plaintiff's counsel in my opinion were not mere irregularities but were substantive and incurable. By reason of these errors and irregularities, I fully agree with the submission of counsel for the 2nd defendant that the plaintiff's counsel was therefore wrong in setting this case down for trial on 28 August 1998.
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5. Whether 2nd Defendant Prejudiced By The Delay?

- d* Counsel for the 2nd defendant's had also raised the issue of serious prejudiced caused to the 2nd defendant by reason of the delay that had occurred. That it was unlikely that the 2nd defendant would get a fair trial as it would now be very difficult for the 2nd defendant to trace witnesses, and gather all relevant documents, as there was every likelihood of documents being lost or missing. This is especially so as the 2nd defendant in this case is being sued in his capacity as guarantor of the 1st defendant company.
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- The fact that the 1st defendant company had since ceased to carry on business, there was every likelihood of many of the records of the 1st defendant being lost as, according to the 2nd defendant, no one had been entrusted to maintain the records of the 1st defendant was also another relevant factor to be taken into consideration. Regard must also be given to the anxiety caused to litigants as a result of litigation.
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- After considering the history of this case I am entirely convinced with the arguments in support of the issue of prejudice to the 2nd defendant.
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- In circumstances I accordingly allowed the 2nd defendant's application with costs.

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